Citation: *MS v Canada Employment Insurance Commission*, 2024 SST 1353

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision dated June 20, 2024 (issued by Service Canada)

Tribunal member:	Emily McCarthy
Type of hearing:	Videoconference
Hearing date:	October 22, 2024
Hearing participant:	Appellant
Decision date:	November 5, 2024
File number:	GE-24-2338

Decision

[1] The appeal is allowed in part.

[2] The Appellant has shown that she was available for work. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits under section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[3] But the Appellant hasn't complied with the requirements of section 50(3) of the EI Act to provide a valid social insurance number (SIN) and a valid work permit with her application for EI benefits claim form. Section 50(1) creates a disentitlement if a claimant fails to fulfil or comply with a condition or requirement set out in section 50. This means that she can't receive EI benefits until she complies with the Commission's requirements.

Overview

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from June 25, 2023, because she wasn't considered available for work in Canada. An Appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement.

[5] The Commission says that the Appellant wasn't available because her work permit had expired. She didn't apply for a renewal of her permit before it expired, and her 900 SIN was invalid. So, she wasn't legally able to work in Canada.

[6] The Appellant disagrees and states that, because she is a citizen of Peru, obtaining a new work permit is merely a technicality because the Canada Peru Free Trade Agreement (FTA) exempts her from going through the Labour Market Impact Assessment (LMIA) process. But she couldn't renew her existing work permit or get a new work permit until she had a job offer. In the meantime, while she was looking for work, she took steps to maintain her legal status in Canada by getting a visitor visa. She was always available for suitable work and would have been able to obtain a new work permit under the Canada Peru FTA in less than 24 hours once she had an offer of

employment. She had been able to do this before when she got her last work permit. She testified that it took 30 minutes at the USA border to get a new work permit issued once she had a job offer from her previous employer.

[7] I must decide whether the Appellant has proven that she was available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[8] The Commission also disentitled the Appellant under section 50(3) of the EI Act for failing to file an application with all requested documents. Namely it said she failed to provide a valid SIN or a valid work permit (or proof she had asked to renew her permit) with her claim form.

[9] The Appellant says she provided the Commission with a copy of her visitor's record which demonstrates she has legal status in Canada.

Preliminary matter

[10] The Commission says that it disentitled the Appellant under section 50(8) of the Employment Insurance Act (EI Act). That section is about a person proving to the Commission that they were making reasonable and customary efforts to find a suitable job.

[11] I don't see any requests from the Commission to the Appellant to prove she was making reasonable and customary efforts in the evidence. I also don't see anything about what type of proof she would need to provide about her efforts.

[12] While not bound by it, I find the reasoning in TM persuasive.[1] That decision says that it is not enough for the Commission to discuss job search efforts. Instead, it must specifically ask for proof from the Appellant and explain to her what kind of proof would be considered "reasonable and customary".

[1] See *TM v Canada Employment Insurance Commission*, 2021 SST 11.

[13] There isn't any mention of section 50(8) of the EI Act or discussion of "reasonable or customary" efforts in the decision or reconsideration process. The first mention is in the Commission's submissions in this appeal.

[14] I find that the Commission didn't disentitle the Appellant under section 50(8) of the EI Act. There isn't any evidence that the Commission asked the Appellant to prove that she was making reasonable and customary efforts to find a suitable job under section 50(8) of the EI Act. This means that I don't need to consider whether the Appellant is disentitled under that section of the law.

[15] The Commission did disentitle the Appellant under section 50(3) of the EI Act. I will consider whether she is disentitled under this section.

Issues

[16] Was the Appellant available for work?

[17] Is the Appellant disentitled under section 50(3) for not providing a valid SIN and/or work permit?

Analysis

Was the Appellant capable and available for work but unable to find a suitable job?

[18] The EI Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[2]

[19] The Commission decided that the Appellant was disentitled from receiving benefits because she wasn't available for work in Canada.

[2] See section 18(1)(a) of the Act. In its arguments (GD4) the Commission mentions issues of capacity based on the Appellant's inability to work because of her expired work permit. But all of its arguments were made in relation to whether she had put an undue restriction on her availability. There is nothing in the evidence that would show that the Appellant was incapable of working. There were no health or other impediments to her ability to look for, or obtain, employment. So, I have only considered whether she was available.

[20] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[3]

a) She wanted to go back to work as soon as a suitable job was available.

b) She has made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[21] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[4]

– **Wanting to go back to work.**

[22] The Commission accepted that the Appellant wanted to go back to work as soon as possible.[5] I agree. The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[23] She testified at the hearing that she was making sustained efforts to find a job in Canada and in other countries. She found a job in Europe in December 2023 and left Canada in January 2024.

[24] I accept that she has shown she wanted to return to work as soon as a suitable job was available.

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[3] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96, and A-57-96. This decision paraphrases those three factors for plain language.
[4] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[5] See GD4-6.

– **Making efforts to find a suitable job**

[25] The Appellant has made enough effort to find a suitable job.

[26] The Appellant's efforts to find a new job included researching and applying for jobs as a biologist in Canada and Europe. Ultimately, she found a job in Europe in December 2023.

[27] The Commission didn't put into question the sufficiency of the Appellant's efforts to find suitable employment.[6] I agree. I find the Appellant's efforts were enough to meet the requirements of this second factor because she made sustained efforts between July and December 2023 to find work and those efforts led to her obtaining employment in December 2023.

– **Unduly limiting chances of going back to work**

[28] The Commission decided that the Appellant set personal conditions that unduly limited her chances of going back to work.

[29] The Commission says that the Appellant unduly restricted her chances of going back to work because she let her work visa expire and didn't apply to renew it. Being unable to legally work in Canada means she cannot prove she is available for work.

[30] The Appellant disagrees and says that once she has an offer of employment, getting a new work permit is a mere technicality. This is because she has both Peruvian and UK citizenship. Her dual nationalities allow her to leave Canada, re-enter, and get a work permit in one day. She testified that she has obtained two different work permits under the Canada Peru FTA. She got the first from the UK. This permit took two to three weeks to be issued. The second work permit was issued in 30 minutes at a USA port of entry. But she needs to have an offer of employment to apply for a work visa under the Canada Peru FTA.

[6] See GD4-6.

[31] Both her contract and her work permit ended at the same time. The Appellant applied for, and got, a visitor's visa which allowed her to maintain legal status in Canada. She acknowledged at the hearing that this visa doesn't allow her to work in Canada.

[32] The Appellant referred to three appeals that were allowed by Umpires in circumstances similar to hers.[7] The Commission says all of these cases involved claimants who still had valid work permits.

[33] There are decisions in which the issue of whether a claimant had a valid and/or unrestricted work permit isn't conclusive of a claimant's availability.[8] There are other decisions summarily rejecting appeals because a claimant doesn't have a valid work permit, hasn't applied for a renewal of their work permit, or hasn't applied for an unrestricted work permit.[9]

[34] More recently, in *Canada Employment Insurance Commission* v *GS*, [10] the Appeal Division of this Tribunal, decided that a claimant who didn't renew her work permit didn't qualify for EI sickness benefits. The claimant's work permit had expired, and she hadn't applied to renew it because she was ill and unable to work. The Appeal Division decided that because the claimant didn't apply to renew her work permit, she had unduly limited her chances of going back to work.

[35] I find the facts in GS are different from those in this appeal. In GS, the claimant said she was unsure how long an application for a renewal work permit would have taken.[11] But here the Appellant has testified that it would take her less than 24 hours to

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[7] The Appellant referred to CUBs 44956, 49652, 62726, and 63940 in her Notice of Appeal document GD2.
[8] See CUB 10602, CUB 14357, and CUB 63940.
[9] See CUB 43501, CUB 35794 and 80177.
[10] See *Canada Employment Insurance Commission* v *GS*, 2022 SST 32.
[11] See *GS* v *Canada Employment Insurance Commission*, 2021 SST 865 overturned by the Appeal Division of the Social Security Tribunal in *Canada Employment Insurance Commission* v *GS*, 2022 SST 32.

obtain a new work permit. This is because, as a Peruvian citizen, the Appellant is LMIA exempt.[12]

[36] I also note that although earlier decisions may be persuasive, I am not bound to follow them.[13]

[37] What is clear is that there is contradictory case law on the issue as to whether a claimant should be considered unavailable if they don't have a valid work permit without restrictions.

[38] In *Desmedt* v *Canada Employment Insurance Commission*, Justice Gauthier, writing as an Umpire, wrote: "…a flexible approach must be adopted because the absence of a **valid permit without restrictions** does not automatically mean that a claimant is not available."[14] In that case, the claimant was a French citizen and benefited from the Canada France FTA. Justice Gauthier concluded that obtaining a modification to the claimant's permit was a mere technicality. She also concluded that the Board of Referees erred when it failed to consider this fact in applying the third *Faucher* factor.

[39] The third *Faucher* factor requires the Appellant to show that she hasn't **unduly** (or overly) limited her chances of going back to work. This requirement doesn't require her to show that there are no impediments to her returning to work. Instead, she must show that any restriction that exists isn't excessive or disproportionate.

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[12] See GD3-10 which a copy of the Appellant's work permit is showing that she is a 'Professional under FTA Canada Peru and LMIA exempt.
[13] As mentioned by Justice Gauthier in CUB 63940 this issue hasn't been appealed to the Federal Court or Federal Court of Appeal. I am only bound to follow jurisprudence of the Federal Court and Federal Court of Appeal.
[14] See *Desmedt* v *Canada Employment Insurance Commission* (2004) CUB 63940.

[40] Based on all of the evidence before me, I find:

- The Appellant has both Peruvian and UK citizenship.[15]
- As a Peruvian national, the Appellant can apply for a limited work permit under the Canada Peru FTA.
- A work permit issued under the Canada Peru FTA is LMIA exempt.[16]
- The Appellant could not renew her expired work permit because she was laid-off by her employer and she didn't have a new offer of employment.
- The Appellant must have a job offer before she can apply for a new work visa under the Canada Peru FTA.
- The Appellant is a professional biologist and has obtained two work permits in Canada as a professional under the Canada Peru FTA.[17]
- The Appellant obtained her last work permit in less than 24 hours at a USA port of entry.
- The Appellant's expired work permit was issued for one year and restricted her to working for her previous employer in Quebec City.[18]
- The Appellant's contract expired on June 23, 2023, and wasn't renewed.
- The Appellant had visitor status in Canada as of July 7, 2023.
- She was a UK citizen which allows her to leave and re-enter Canada without any visa.[19]

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[15] See GD3- and RDG-09
[16] See work permit at GD3-10.
[17] See GD3-10 and Appellant's testimony.
[18] See GD3- 10.
[19] The Appellant provided proof of her UK citizenship after the hearing. See RDG-09.

[41] I accept that the Appellant has shown that she is able to obtain a work permit in less than 24-hours once she receives a job offer. She has also shown that she had legal status to remain in Canada while she was looking for work.[20]

[42] The Commission says in its submissions that proof of the Appellant's special status through the Canada Peru FTA is relevant to rebutting the presumption that she is not available because she doesn't have a valid work permit.[21] She provided this evidence by way of her sworn testimony at the hearing. She also provided proof that she had been given a work permit that was LMIA exempt, under the Canada Peru FTA.[22] And she provided proof of her UK citizenship.[23]

[43] I find, in the specific circumstances of the Appellant, not having a valid work permit wasn't an **undue** restriction on her ability to go back to work. This is because her dual nationality (UK and Peruvian) makes obtaining a new work permit a mere technicality once she has a job offer.[24] And she had legal status to remain in Canada as a visitor while she was looking for work.

[44] This means the absence of a valid work permit wasn't an **undue** restriction on the Appellant's ability to go back to work.

– **So, was the Appellant capable of and available for work?**

[45] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work but unable to find a suitable job.

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[20] See the Appellant's visitor visa at page GD3-22.
[21] See GD4-7.
[22] See work permit at GD3-10.
[23] See RDG-09.
[24] See the Canada Peru Free Trade Agreement, chapter 12 and section 200 to 207 of the Immigration and Refugee Protection Regulations.

Is the Appellant disentitled under section 50(3) of the EI Act?

[46] The Commission applied a second disentitlement under section 50 of the EI Act because the Appellant didn't provide a valid SIN and/or a valid work visa or proof of a renewal application with her application for EI benefits. The Commission decided that this was a failure to file an application with all requested documents including a mandatory document showing authorization to work (actual or implied status) as required by section 50(3) of the EI Act.

[47] There is no question that the Appellant's work permit had expired before she made her application for EI benefits on July 14, 2023. In the absence of a valid work permit, an individual's 900 series SIN also becomes invalid.

[48] The Appellant argues that she should be considered to have satisfied the Commission's requirements when she submitted her visitor record which gave her legal status in Canada.

[49] But a visitor record doesn't give an individual the right to work in Canada. Indeed, her visitor record clearly states that she cannot work in Canada.[25]

[50] This means the Appellant isn't able to show that she provided all requested documents. She was unable to provide a valid work permit or documentation showing that she had applied to renew her permit (which would have given her implied status to work while the renewal was being processed).

[51] While it may seem unfair for a person to be available for work and yet be disentitled for failing to provide a valid work permit and/or SIN, when she cannot do so, sections 50(1) and (3) of the EI Act allow for such a situation.

[52] I find the Appellant hasn't provided all of the information required by the Commission in her claim form as per section 50(3) EI Act. This means the disentitlement under section 50(1) and 50(3) of the EI Act remains in effect.

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[25] See GD3-26.

[53] I note that the Commission has discretion to waive or vary any of the conditions or requirements found in section 50 if it is of the opinion that the circumstances warrant it.[26]

[54] There is no evidence that the Commission considered exercising its discretion set out in section 50(10) of the Act. It may wish to consider whether this would be an appropriate case to do so.

Conclusion

[55] The Appellant has shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant isn't disentitled from receiving EI benefits. So, the Appellant may be entitled to benefits.

[56] But the Appellant hasn't complied with the Commission's requirement that she provide it with a valid work permit (or proof of a renewal application) under section 50(3) of the Act. This means the disentitlement under section 50 remains in place.

[57] This means that the appeal is allowed in part.

Emily McCarthy
Member, General Division – Employment Insurance Section

[26] See section 50(10) of the EI Act.